In the Supreme Court of the United States

OCTOBER TERM, 1924

DOMENICO DUMBRA AND FORTUNATO CHIAPparone, plaintiffs in error
v.
THE UNITED STATES

No. 546

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES

STATEMENT

On February 15, 1924, a search warrant was issued by Judge Knox of the District Court for the Southern District of New York to James J. Biggins, an agent and employee of the United States Treasury Department and charged with the duty of enforcing the National Prohibition Act, authorizing the search of a grocery store at 514 East Sixteenth Street and the adjoining premises, No. 512 East Sixteenth Street, New York City, where plaintiff in error Dumbra maintained a winery under a permit from the Government, and directing the seizure

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of any intoxicating liquor possessed in violation of the National Prohibition Act. (R. 2.)

Execution of the warrant resulted in the seizure of 74 bottles of wine, including gallons, half-gallons, and quarts, from the grocery store at premises No. 514, and 50 barrels of wine, and a large quantity of wine in barrels and bottles, from the winery at premises No. 512. (R. 7.)

On February 27, 1924, a motion was made to quash the search warrant, so far as it affected premises No. 512 East Sixteenth Street, and for the return of the 50 barrels of wine seized therefrom. The grounds of the motion were that the search warrant was issued without probable cause and that the officer serving the warrant had no authority to receive and execute the same. (R. 8.) On a hearing before Judge Knox the motion was denied. (R. 30.) A direct writ of error brings the case here.

QUESTIONS INVOLVED

The principal assignments of error are that the search warrant violated the rights of plaintiffs in error under the Fourth Amendment because—

(*a*) The warrant was issued without probable cause for believing the existence of the grounds upon which it was granted, so far as it affected premises No. 512 East Sixteenth Street; and

(*b*) James J. Biggins, to whom the warrant was directed, was not a person authorized by law to execute search warrants.

ARGUMENT

I

The showing of probable cause was sufficient for the issuance of the search warrant

The search and seizure in question were made under the authority of the Espionage Act (June 15, 1917, c. 30, Title XI, 40 Stat. 228 et seq.) as the same has been made applicable to cases involving a violation of the National Prohibition Act, Sec. 2, Title II (Act October 28, 1919, c. 85, 41 Stat. 305, 308). Section 5, Title XI, of the Espionage Act provides:

> The affidavits or depositions must set forth the facts tending to establish the grounds of the application or probable cause for believing that they exist.

This provision, the Government insists, has been fully complied with in the instant case. The search warrant contained the following (R. 2):

> Whereas, it appears from the affidavit of Joseph Smith, that certain intoxicating liquors containing more than ½ of 1 per cent of alcohol by volume and fit for use for beverage purposes is unlawfully held and possessed in a certain winery known as D. Dumbra & Co. located on the first floor and basement of the building located at 512 E. 16th St., and the grocery store adjoining said building, located at 514 East 16th St., Borough of Manhattan, City and Southern District of New York, and in any closet, vault,

cellar, subcellar, room or rooms connected with or used in connection with said winery or said grocery store, and that said liquor is used and is intended for use and has been used in violating Title II of the National Prohibition Act in that said liquor was and is wilfully, knowingly, and unlawfully held in said premises.

The search warrant was based upon the affidavit of Agent Smith, who makes the following statement (R. 5–6):

> On February 12, 1924, at about 4.00 p. m., accompanied by other agents, I went to the store located in the building at 514 East 16th St., Borough of Manhattan, City and Southern District of New York. This store adjoins a winery conducted by D. Dumbra and Co., which winery is located in the building at 512 E. 16th St., Borough of Manhattan, City and Southern District of New York. In the grocery store I saw Mrs. Dumbra and her son. I said to him that I wanted a gallon of port wine, and another agent with me said he wanted a gallon of sherry wine. The son stated that the price of sherry is $6 a gallon, and the price of port, $5 a gallon. He then went to the back of the grocery store, behind the partition, and turned to the right toward the winery, which is in the adjoining building. In a short time he came back with two gallons of wine and wrapped them up separately in paper bags. The agent with me then paid Mrs. Dumbra $11 for the two gallons of wine. We brought

the wine away from the premises, and tasted of the same. I am familiar with the taste of intoxicating liquor and I know that said wine contained more than ½ of 1 per cent of alcohol by volume. As we left the grocery store, the son of Dumbra came out the front door of the grocery, and entered the front door of the winery.

Several days ago I went to said grocery store where I saw the same son, who sold me wine as above set forth, and I stated to him that I wanted a gallon of port wine. The son asked me if " Burnsie " sent me. I said yes, and he then said alright. He told me to wait and he would go get the wine for me. He then went in the back of the store and turned toward the winery, after telling me to wait outside. I went out on the street and in a short time he came out of the front door of the wine store at 512 E. 16th Street, with a gallon of wine wrapped up in a paper bag, and delivered it to me on the street. I paid him $5 for the wine in the store before he told me to wait for him outside. I tasted of the wine and know that it was intoxicating. At no time did I present any papers or authority whatever for the buying of wine for sacramental or religious purposes.

This is a statement of facts based upon the agent's personal knowledge of what he saw, and is not based upon rumor, surmise, conjecture, or suspicion. The affidavit sets forth evidentiary facts. The agent says that when he called at the store on

February 12 and inquired for wine the son of Dumbra, after stating the price, went to the rear of the store beyond a partition, turned to the right in the direction of the winery, and soon returned with the wine. As the agent left, the son came out the front door of the store and went into the winery. On another visit to the store the son told the agent to wait outside and he would get the wine. As the agent went out he saw the son go to the rear of the store and turn toward the winery. In a short time the son came out the front door of the *winery* with the wine and delivered it to the agent on the street. It is upon this statement of facts of what the agent actually saw and knew from his own investigations, and of what he learned through purchases made by other agents, that he bases the following conclusions (R. 6):

> I know that wine is being sold from the grocery store at 514 East 16th Street, and that the source of supply is the winery located at 512 East 16th Street.
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> The said premises are within the Southern District of New York, and upon information and belief have thereon a quantity of intoxicating liquor containing more than ½ of 1 per cent of alcohol by volume, and fit for use for beverage purposes, which is used, has been used, and is intended for use in violation of a statute of the United States, to wit, the National Prohibition Act.

It is submitted that the affidavit sets forth sufficient facts to constitute reasonable grounds for the

agent's belief that intoxicating liquor was being unlawfully possessed upon the premises and that these facts, taken together, were of such a nature as to warrant the judge's finding of the existence of probable cause for the belief that a crime was being committed on the premises sought to be searched. As the facts recited in the affidavit were sufficient to support the agent's conclusions, so also was the affidavit ample to sustain the warrant.

The case is largely controlled by this Court's decision, announced April 13, 1925, in case No. 235, *Steele* v. *United States.*

Plaintiffs in error's contentions would appear to be based on the assumption that the agent should have had positive knowledge that the liquor sold in the store was procured from the winery. But positive knowledge was not required, only "facts tending to establish the grounds of the application or probable cause for believing that they exist." Espionage Act, Title XI, Section 5. Probable cause has been defined by this Court as "A reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief that the party is guilty of the offense with which he is charged." *Stacey* v. *Emery*, 97 U. S. 642, 645. In 24 R. C. L., p. 707, it is said:

> The question of probable cause does not depend on whether the offense had been committed in fact, or whether the accused is guilty or innocent, but on the affiant's belief

> based on reasonable grounds. He may act on appearances, and if the apparent facts are such that a discreet and prudent man would be led to believe that the accused had committed a crime, he will not be liable for malicious prosecution although it may turn out that the accused was innocent.

Moreover, if positive knowledge were required it would be impossible, in many instances, to enforce the Eighteenth Amendment. Section 3, Title II, of the National Prohibition Act provides that all the provisions of the Act shall be liberally construed to the end that the use of intoxicating liquor as a beverage may be prevented. Agents rarely have an opportunity, before a warrant is issued and a search actually made, to acquire positive knowledge of the presence of contrabrand liquor on premises sought to be searched. All that they can do, and all that is legally required, is to present facts tending to establish probable cause for believing that liquor is being unlawfully possessed. See *In re Kupferberg,* 284 Fed. 914, 915; *Elrod* v. *Moss,* 278 Fed. 123, 128–130. It is on these facts that the judge or commissioner issuing the warrant determines the existence of probable cause.

United States v. *Kaplan,* 286 Fed. 963.
United States v. *Dziadus,* 289 Fed. 837.
Giles v. *United States,* 284 Fed. 208.
United States v. *Borkowski,* 268 Fed. 408.
Veeder v. *United States,* 252 Fed. 414.
United States v. *Kelih,* 272 Fed. 484.
United States v. *Ray & Schultz,* 275 Fed. 1004.

The several contentions of plaintiffs in error are well answered in the opinion of Judge Knox denying the motion to quash the warrant. He said (R. 35–36):

> No denial is made that the persons who sold wine to Smith in the grocery store sustain the relationship of wife and son to Domenico Dumbra, who makes the main affidavit in support of the motion to vacate the warrant. No explanation is given as to how the wine found in the grocery store came to be there. In the absence of proof to the contrary, it is reasonable to suppose that it came from the winery, and that it was intended for sale for unlawful purposes. The inference may also be made that, as required, the stock of wine in the grocery was replenished from the winery. If the senior Dumbra is in no way chargeable with these necessary inferences, he should specifically show his lack of connection with the facts averred in the Smith affidavit. If they are open to a truthful denial, and it was made, a hearing might be had under the provisions of Section 15 of the Espionage Act. The only statement of a specific nature tending to avoid the conclusion that the wine in the store came from the winery is that no door physically connects the two premises.
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> While only two actual sales of wine are set forth in the Smith affidavit, the finding of 74 bottles of wine in the store indicates a readiness to make many more sales.
>
> The circumstances, as a whole, are enough to cause one to conclude that the business, as

> carried on in the winery, and in what seems to be its authorized outlet, was unlawful and that the winery was not immune from search and seizure upon probable cause. *In re Kupferberg,* 284 Fed. 914. The search, therefore, was not in violation of the Fourth Amendment to the Constitution.

In the assignments of error (R. 38–39) it is urged that there was no allegation in the affidavit, nor other proof before the court, that Mrs. Dumbra and the alleged son were the wife and son of plaintiff in error Dumbra, nor that Dumbra had any part in the sale of the wine in the grocery store or any other connection with the store.

As stated by Judge Knox, no denial was made that the persons who delivered wine to Agent Smith sustained the relationship of wife and son to Dumbra. In the absence of such denial the inference that they were the wife and son of Dumbra is not unreasonable. But whether or not that was their relationship, they were his agents in the unlawful undertakings. It it unreasonable to suppose that the transactions described in the affidavit could have occurred without Dumbra's knowledge or passive assent. The reasonable assumption is that the wife and son were acting in conjunction with him in the sales made by them. In *Singer* v. *United States,* 288 Fed. 695, a case involving a similar transaction, the court said (p. 697):

> Agency of the wife in the sale of liquor on her husband's premises, even when he is absent, and even when he is ignorant of the

sale, may be inferred from the circumstances, *Commonwealth* v. *Lafayette,* 148 Mass. 130; *Wiggins* v. *United States* (C. C. A.), 272 Fed 41, 45; and the husband's coercion of his wife unlawfully to conduct his business in his absence may likewise be gathered from the circumstances, *State* v. *Martini,* 80 N. J. Law, 685. There is in this case no evidence that Mrs. Singer was acting for herself, but there is, we think, sufficient evidence to enable a jury to find that she was acting either as her husband's agent or passively under his influence.

The affidavit shows, beyond a reasonable doubt, that the store was being used in conjunction with the winery for the illegal sale of wine with the full knowledge, if not the active participation, of the plaintiffs in error. It is not essential that the sales should have taken place in the winery, if plaintiffs in error were manufacturing or keeping wine for the purpose of illegal sale on the street, in the store, or at any other place. The repeated sales by Dumbra's family and the manner in which the wine was delivered to the purchasers in the store and on the street indicate strongly that the winery was being used for the keeping of wine for illegal purposes.

It is said (R. 13) that the store and winery were physically independent of each other. The affidavit, however, shows that ready access was had from the one to the other both in the rear and the front of the premises. No explanation was made as to how the wine in the grocery store came to be

there, nor why, as shown in the affidavit, wine was apparently delivered from the winery as occasion required.

It is also claimed (R. 40) that the court erred in failing to quash the search warrant, because the liquors in question were lawfully possessed under a permit granted by the Government.

Even though plaintiffs in error originally acquired the wine under a permit, they maintained a nuisance in the winery when they kept it for the purpose of illegal sale. No permit showing that Agent Smith had authority to purchase wine for sacramental or religious purposes was ever requested of him. In *Matter of Silberman Sacramental Wine Co.* (decided March 19, 1924, but unreported), a case involving a permittee, Judge Knox said:

> I should think that a permittee, when he is clearly shown to be generally engaged in both the lawful and unlawful sale of intoxicating liquors, could not successfully resist a seizure. My feeling is that the court is not called upon to be at pains to differentiate between the portions of his stock held for lawful and unlawful purposes.

So here, plaintiffs in error, after obtaining the wine under a permit, should not be allowed to use it for illegal purposes and then claim immunity because of the fact that their original possession was lawful. See *In re Kupferberg*, 284 Fed. 914; *Reid* v. *United States*, 276 Fed. 253.

II

The officer serving the search warrant was authorized to receive and execute the same

It is next contended that the court erred in finding that James J. Biggins, to whom the search warrant was issued, was a civil officer of the United States within the meaning of the Constitution and the National Prohibition Act and was authorized to receive and execute search warrants.

It appears to be conceded (R. 11, 31) that Biggins was an agent and employee of the United States; that he was regularly appointed by the Commissioner of Internal Revenue; that the appointment was approved by the Secretary of the Treasury, and that he was charged with the duty of enforcing the National Prohibition Act. (See Sec. 2, Title II, National Prohibition Act; Sec. 6, Title XI, Espionage Act.)

Plaintiffs in error's contention that Biggins was not authorized to receive and execute the search warrant in question has been foreclosed by this Court's decision, rendered April 13, 1925, in case No. 636, *Steele* v. *United States.*

CONCLUSION

It is submitted that the search warrant was valid and was executed by an officer authorized to receive and execute the same; that plaintiffs in error were deprived of no constitutional rights, and that the order of the District Court declining to quash the

search warrant and return the seized property should be affirmed.

Respectfully,

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APRIL, 1925.

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